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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SECURITIES AND EXCHANGE
11 COMMISSION,

12 Plaintiff,

13 v.

14 ANDY SHIN FONG CHEN, et al.,

15 Defendants, and

16 NORTH AMERICAN FOREIGN
17 TRADE ZONE INDUSTRIES, LLC,
18 et al.,

19 Relief Defendants.

CASE NO. C17-0405JLR

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

20 **I. INTRODUCTION**

21 Before the court are: (1) Defendants Andy Shin Fong Chen (“Mr. Chen”) and
22 Aero Space Port International Group, Inc.’s (“ASPI”) (collectively, “Defendants”) and
North American Foreign Trade Zone Industries, LLC (“NAFTZI”), Washington

1 Economic Development Capital, LLC (“EDC I”), Washington Economic Development
2 Capital II, LLC (“EDC II”), EVF, Inc. (“EVF”), Moses Lake 96000 Building, LLC
3 (“Moses Lake 96000”), Sun Basin Orchards, LLC (“Sun Basin Orchards”), PIA, LLC
4 (“PIA”), John Chen, Tom Chen, Bobby Chen, and Heidi Chen’s (collectively, “Relief
5 Defendants”) motion for summary judgment (Def. MSJ (Dkt. # 25)); and (2) Plaintiff
6 Securities and Exchange Commission’s (“SEC”) motion for summary judgment (Pl. MSJ
7 (Dkt. # 36)). The SEC opposes Defendants and Relief Defendants’ motion for summary
8 judgment. (Pl. Resp. (Dkt. # 31).) Defendants and Relief Defendants oppose the SEC’s
9 motion for summary judgment. (Def. Resp. (Dkt. # 39).) The parties filed replies. (Def.
10 Reply (Dkt. # 32); Pl. Reply (Dkt. # 44).) The court has considered the motions, the
11 parties’ submissions concerning the motions, the relevant portions of the record, and the
12 applicable law. Being fully advised,¹ the court GRANTS in part and DENIES in part the
13 SEC’s motion for summary judgment. The court further GRANTS in part and DENIES
14 in part Defendants’ motion for summary judgment.

15 II. BACKGROUND

16 This case is a securities enforcement action. It arises out of Defendants’ alleged
17 misuse of the EB-5 Immigrant Investor Program (“EB-5”), which affords certain foreign
18 investors a path to permanent residency in the United States. (*See generally* Compl.
19 (Dkt. # 1).) The SEC alleges that Defendants violated securities laws by making material

21 ¹ No party requests oral argument on the motions (*see generally* Def. MSJ; Pl. Resp.; Pl.
22 MSJ; Def. Resp.), and the court has determined that oral argument would not be of assistance in
deciding the motions, *see* Local Rules W.D. Wash. LCR 7(b)(4).

1 misrepresentations to foreign investors who purchased membership interests in an EB-5
2 project based in Moses Lake, Washington. (*See, e.g., id.* ¶¶ 26-35, 71-72.) According to
3 the SEC, Defendants misappropriated millions of dollars in investor funds for uses
4 unrelated to the EB-5 venture to which investors committed their capital. (*See, e.g., id.*
5 ¶¶ 37-70.) Defendants deny that they materially misrepresented aspects of their EB-5
6 project to foreign investors. (*See generally* Answer (Dkt. # 17); Def. MSJ.) The court
7 outlines the EB-5 program before detailing the factual background to the SEC’s claims.

8 **A. The EB-5 Program**

9 Administered by United States Citizenship and Immigration Services (“USCIS”),
10 the EB-5 program allows certain foreign investors to obtain visas and, eventually, lawful
11 permanent resident status. *See* 8 U.S.C. § 1153(b)(5); (*see generally* Worland Resp.
12 Decl. (Dkt. # 30) ¶ 3, Ex. 2 (“USCIS Policy Manual, Ch. 2”).) Eligible immigrant
13 investors must show that: (1) they have invested or are in the process of investing a
14 specified amount of capital in a new commercial enterprise; and (2) their investment will
15 create at least 10 jobs for United States workers. 8 U.S.C. § 1153(b)(5)(A); (*see also*
16 USCIS Policy Manual, Ch. 2 at 1 (noting that the EB-5 program requires “an investment
17 of capital . . . in a new commercial enterprise . . . which creates jobs”).) Where the new
18 commercial enterprise is based in a “targeted employment area,” immigrant investors
19 must invest a minimum of \$500,000.00. *See* 8 U.S.C. § 1153(b)(5)(C); (*see also* USCIS
20 Policy Manual, Ch. 2 at 9.)

21 In the early 1990s, lawmakers amended EB-5 program requirements to permit
22 foreign investors to pool their capital in “regional centers,” USCIS-approved entities

1 committed to supporting economic growth in particular regions. *See* 8 C.F.R. § 204.6(e);
2 *see also id.* § 204.6(m)(1) (citing Section 610 of the Departments of Commerce, Justice,
3 and State, the Judiciary, and Related Agencies Appropriation Act of 1993, Pub. L.
4 102-395, 106 Stat. 1828). Regional centers collaborate with new commercial enterprises,
5 which in turn may affiliate with one or more “job-creating” entities to carry out specific
6 investment projects. (*See* USCIS Policy Manual, Ch. 2 at 7.)

7 In the regional center context, immigrant investors may qualify for EB-5 status
8 and permanent residency if their investments “indirectly” create at least 10 jobs. (*See id.*
9 at 10.) A foreign investor cannot qualify for EB-5 status merely by showing that the
10 investor remitted funds to a new commercial enterprise that pledged to loan those funds
11 to a job-creating entity, however. (*Id.* at 7.) Rather, the investor must show that the new
12 commercial enterprise made “the full amount” of his or her investment “available” to the
13 entity or entities responsible for the job creation upon which the investor’s immigration
14 petition is based. (*Id.*); *see also In re Izummi*, 22 I. & N. Dec. 169, 179 (B.I.A. 1998).

15 An EB-5 investor’s path to permanent residency has two steps. First, the investor
16 files a petition for EB-5 status (“the I-526 petition”), which requires that the investor
17 show it is more likely than not that his or her investment will satisfy the job-creation
18 requirements. (*See* Worland Resp. Decl. ¶ 4, Ex. 3 at 1-2.) If the I-526 petition is
19 approved, the investor may go on to acquire conditional permanent resident status. (*Id.*)
20 Second, approximately two years after USCIS approves the I-526 petition, the investor
21 files a petition to remove the conditions on his or her permanent resident status (“the
22 I-829 petition”). (Worland Resp. Decl. ¶ 5, Ex. 4 (“USCIS Policy Manual, Ch. 5”) at 2);

1 *see also* 8 U.S.C. § 1186b(c)(1). For the I-829 petition to succeed, the investor must
2 demonstrate that he or she invested the requisite capital and that the investment created,
3 or will create within a reasonable period, at least 10 qualifying jobs. (USCIS Policy
4 Manual, Ch. 5 at 2-3.)

5 **B. Factual Background**

6 1. ASPI, NAFTAZI, and EDC III

7 ASPI, a Washington State corporation, was designated a regional center in 1994.
8 (Def. MSJ at 4; Compl. ¶ 11.) Since then, ASPI has managed several EB-5 projects in
9 rural Grant County, Washington. (Chen Decl. (Dkt. # 26) ¶¶ 6, 11.) In addition, ASPI
10 engages in business activities related to the Chen family's substantial real estate holdings.
11 (Compl. ¶ 11; *see also* Chen Decl. ¶ 19.) ASPI's shareholders include Mr. Chen, John
12 Chen, Tom Chen, and Bobby Chen. (Chen Decl. ¶ 11.) Mr. Chen, John Chen's son and
13 ASPI's president, manages ASPI's day-to-day operations, including its EB-5 initiatives.
14 (*Id.*; Compl. ¶ 11.)

15 In 2009, USCIS recertified ASPI as a regional center under the EB-5 program.
16 (Chen Decl. ¶ 24, Ex. 1 at 1.) In a letter to Mr. Chen, USCIS confirmed that, for
17 purposes of its role as a regional center, ASPI's "geographic area" encompassed all of
18 Grant County, Washington. (*Id.*) Additionally, USCIS stated that, as a regional center,
19 ASPI could "either direct investments into single projects or form an investment fund to
20 fund multiple projects." (*Id.*) Defendants state that the recertification letter granted ASPI
21 authority to operate pursuant to a "pooled loan model" in which immigrant investors
22 would "act as secured commercial lender[s]." (Chen Decl. ¶¶ 23-24.)

Two ASPI-related entities are integral to the EB-5 project at issue in this suit. The first, EDC III, is a Washington State limited liability company founded in 2011. (Chen Decl. ¶ 26, Ex. 3 (“LLC Agreement”) at 2.) ASPI is EDC III’s managing member, and Mr. Chen is its registered agent. (Worland Resp. Decl. ¶ 2, Ex. 1.) EDC III is the new commercial enterprise for purposes of the EB-5 project at issue here. (Def. MSJ at 8); *see also* 8 U.S.C. § 1153(b)(5)(A). The second entity, NAFTZI, is a wholly-owned ASPI subsidiary. (Compl. ¶ 13; Answer ¶ 13.) NAFTZI is “the developing entity” of ASPI Commerce Park, an industrial and commercial complex in Moses Lake, Washington. (Chen Decl. ¶ 26, Ex. 4 (“Program Mem.”) at 11.) Mr. Chen is NAFTZI’s president and the sole signatory on all of NAFTZI’s bank accounts. (Compl. ¶ 13; Answer ¶ 13.) NAFTZI was to function as the job-creating entity in EDC III’s EB-5 project. (*See* Def. MSJ at 8; *see also* USCIS Policy Manual, Ch. 2 at 7.)

2. The Offering Documents

Prior to investing in EDC III, each foreign investor received three documents: (1) the “Subscription Agreement, Power of Attorney, and Representation Letter” (“Subscription Agreement”); (2) the “Limited Liability Company Agreement of Washington Economic Development Capital III, L.L.C.” (“LLC Agreement”); and (3) the “Confidential Program Description Memorandum” (“Program Memorandum”) (collectively, “the Offering Documents”). (*See* Chen Decl. ¶ 26, Ex. 2 (“Subscription Agreement”); LLC Agreement; Program Mem.) Each document explained the purpose of foreign investment in EDC III as follows:

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1 Notwithstanding the authorized scope of allowable activities afforded the
2 LLC under the statute and within this Agreement, the primary focus of the
3 LLC will be to create a pool of capital to be used principally for Community
4 Economic Development Loans as approved by the USCIS in 2009. . . .

5 The purpose of the Community Economic Development Loan(s) will be to
6 provide a funding source for a new development project(s) within ASPI
7 Group's approved Regional Center in Grant County, Washington, thereby
8 enabling the [investors] to qualify as Immigrant Investors under the U.S.
9 Immigration and Naturalization [sic] Act EB-5 visa program.

10 (Subscription Agreement at 2; LLC Agreement at 1-2; Program Mem. at 10-11.)

11 The Offering Documents further represented that investors' funds would be used
12 to finance a specific project in satisfaction of EB-5 program requirements: the upgrade of
13 ASPI Commerce Park. (Subscription Agreement at 2; LLC Agreement at 2; Program
14 Mem. at 11.) According to the Program Memorandum:

15 The Immigrant Investor's funds will be used to fund the purchase and
16 development of the ASPI Commerce Park which includes the purchase,
17 refinance, refurbishing and upgrade of existing ASPI Commerce Park
18 buildings 1, 2, and 3 and the construction of ASPI Commerce Park 4, a
19 100,000 +/- sq. ft. tilt-concrete warehouse, distribution, and manufacturing
20 building. . . . The funds will be provided to North American Foreign Trade
21 Zone Industries, LLC, a Washington Limited Liability Company
22 (NAFTZI). . . . The funding to NAFTZI will be used to finance, refinance,
and upgrade the existing buildings (ASPI Commerce Park 1-3) and further
develop the ASPI Commerce Park (construction of the 100,000 sq. ft. ASPI
Commerce Park 4), including, but not limited to, extend/upgrade industrial
infrastructure including sanitary sewer, municipal water, roads, electric and
telecommunications facilities and rail access.

(Program Mem. at 11.) Similarly, the LLC Agreement described the purpose of foreign
investors' investments as follows:

The funding to NAFTZI will be used to finance and develop the ASPI
Commerce Park 4 Building and including, but not limited to, refurbish,
remodel, and refinance the existing buildings on the site (ASPI Commerce
Park 1, 2, and 3) as well as extend/upgrade industrial infrastructure to the

1 ASPI Commerce Park 4 site. The finished product will cause the entire ASPI
2 Commerce Park project to remain state-of-the-art while adding an additional
3 100,000 square feet of warehouse/manufacturing space. This overall
4 improvement will involve additional infrastructure upgrades including
5 sanitary sewer, municipal, water, roads, electric and telecommunications
6 facilities and rail access.

7 (LLC Agreement at 3.) The LLC Agreement further stated that the ASPI Commerce
8 Park project was projected “to create 230 direct jobs and 90 indirect jobs.” (*Id.* at 5.)

9 According to the Offering Documents, the EDC III project would accommodate
10 up to 31 foreign investors, each of whom would purchase a “Unit of Membership” in
11 EDC III for \$500,000.00, for a total pool of up to \$15.5 million. (Subscription
12 Agreement at 2; LLC Agreement at 1; Program Mem. at 3.) In addition, investors would
13 pay \$60,000.00 in fees, to be used for marketing expenses, third party commissions, and
14 other administrative costs. (LLC Agreement at 1; Program Mem. at 9.) Pursuant to the
15 Offering Documents, each investors’ money would remain in escrow until USCIS
16 approved his or her I-526 petition. (Program Mem. at 9.) Upon approval of the I-526
17 petition, the investor would become “an official Member” of EDC III. (*Id.*) At that
18 point, the investor’s funds would be released from escrow and “placed in the pool” for
19 EDC III’s use. (*Id.*; *see also* Subscription Agreement at 1.)

20 The Offering Documents further explained that EDC III would disburse investors’
21 money in the form of a five-year “loan” to NAFTAZI, which would undertake the new
22 development project at ASPI Commerce Park. (Subscription Agreement at 2-3; LLC
Agreement at 2-3; Program Mem. at 11.) The loan would be secured by a first position
deed of trust on ASPI Commerce Park and would accrue interest at a rate of 3.25% per

1 year. (Subscription Agreement at 3; LLC Agreement at 3; Program Mem. at 11-12.) The
2 Offering Documents stated that ASPI would be entitled to approximately 85% of the
3 interest generated on the loan. (Subscription Agreement at 3; LLC Agreement at 3;
4 Program Mem. at 12; *see also* Compl. ¶ 32; Answer ¶ 32.) The remaining interest would
5 be used to pay for “applicable [ASPI] expenses such as professional, consulting, legal,
6 overhead and accounting fees.” (Subscription Agreement at 3; LLC Agreement at 4;
7 Program Mem. at 12.) Any interest in excess of such expenses would be returned to
8 investors. (*Id.*) At the end of the five-year period, NAFTAZI would “refinance the ASPI
9 Commerce Park project from other financing sources and pay off the outstanding balance
10 of [the] loan” from EDC III. (LLC Agreement at 4.)

11 Notwithstanding the Offering Documents’ focus on the ASPI Commerce Park
12 project, the Offering Documents vaguely suggested that ASPI might use investors’ funds
13 in connection with other job-creating EB-5 projects in the ASPI regional center. For
14 example, the LLC Agreement stated that EDC III investors’ capital would be used to
15 fund “Community Economic Development Loans through direct and indirect funding of
16 industrial commercial development along with attendant and supporting retail, financial,
17 and residential projects.” (*Id.* at 4-5.) Similarly, the Program Memorandum stated that
18 ASPI would “review funding applications and proposals from various Qualifying
19 Employment Creating Commercial Enterprises” within the ASPI regional center.
20 (Program Mem. at 13.) The Program Memorandum further stated that, as
21 investor-funded loans “[were] repaid, the ‘pooled’ funds [would] be replenished and
22 //

1 [could] be loaned again to other qualifying commercial enterprises[,] thereby enhancing
2 the employment creation opportunities of the Immigrant Investor’s funds.” (*Id.* at 2.)

3 In February 2012, EDC III and NAFTAZI executed an agreement on the terms of
4 the EB-5 loan. (Chen Decl. ¶ 29, Ex. 5 (“Loan Agreement”) at 1.) The agreement
5 provided that “[t]he source of the funding [of the loan] is through the USCIS EB-5
6 Investor Pilot Program, and the Lender’s funds are limited to the guidelines of the USCIS
7 and the number of investors recruited.” (*Id.*) The agreement further stated that
8 “[f]unding [would] not [be] available until the immigrant investors’ I-526 are approved,”
9 and that “at least 16 investors’ I-526 must be approved before the borrower [NAFTZI]
10 may draw any money from the loan.” (*Id.*) Mr. Chen represents that, “a[s] promised in
11 the ‘Offering Documents[,]’ the loan was secured by a first position Deed of Trust
12 pledging ASPI Commerce Park consisting of approximately 17 acres.” (Chen Decl.
13 ¶ 29.)

14 Construction on Commerce Park 4 began in the fall of 2015. (Compl. ¶ 61.)²
15 According to Defendants, Commerce Park 4 has been “completed precisely as described
16 in the formation documents.” (Chen Decl. ¶ 37.) Defendants contend that the new
17 facility is “full leased” (*id.*) and assert that the project is “estimated to create 235.8 direct,
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19 ² Defendants acknowledge that construction commenced after 10 investors received I-526
20 approvals, rather than the 16 approvals required in the loan agreement between EDC III and
21 NAFTAZI. (Chen Decl. ¶¶ 32, 36.) Mr. Chen asserts that ASPI chose to move forward with
22 construction in light of severe delays in processing Chinese nationals’ EB-5 petitions at USCIS.
(Def. Reply at 7; *see also* Chen Decl. ¶ 36 (claiming that processing delays put ASPI “in the
untenable position of wanting to protect the investors that had been approved by commencing
construction of the project within the qualifying time window for their approvals”).)

1 indirect, and induced jobs” (Chen Supp. Decl. (Dkt. # 33) ¶ 2, Ex. 1 at 4). The parties
2 stipulate that NAFTAZI paid a total of \$4,552,378.48 to the company responsible for
3 constructing Commerce Park 4. (Worland Resp. Decl. ¶ 16, Ex. 15 (“Stip.”) ¶ 5.)

4 3. Disbursement of Investor Funds

5 Thirty nationals of China, Taiwan, and South Korea invested in EDC III.
6 (Worland Resp. Decl. ¶ 14, Ex. 13 (“Misuraca Rep.”) at 7-8.) Investors deposited or
7 wired a total of \$14,534,710.00 into EDC III bank accounts. (*Id.* at 3.) Of that sum, \$13
8 million represented investors’ capital and \$1,534,710.00 represented fees. (*Id.*) An
9 additional \$2,060,100.00 was held in escrow, of which \$2 million represented investors’
10 capital and \$60,100.00 represented fees. (*Id.*)

11 The SEC’s expert witness, Yasmine Misuraca, a forensic accountant, traced the
12 path of “all monies transferred in and out of [EDC III’s] bank accounts” between May 17,
13 2011, and September 30, 2016. (*Id.* at 1, 14.) According to Ms. Misuraca’s report,
14 “[Mr.] Chen was the sole signatory for each [EDC] III bank account” and “had sole
15 authority to initiate the transfer of funds from said bank accounts.” (*Id.* at 15.) Ms.
16 Misuraca concluded that, as of July 31, 2015, “approximately \$14,534,419, of the
17 \$14,534,710, of [the] Investors’ money had been disbursed” from the EDC III accounts.
18 (*Id.* at 3.)

19 Ms. Misuraca tracked each disbursement of EDC III investors’ funds. (*See id.* at
20 23-36.) She found that, in total, Defendants transferred approximately \$7,566,535.00 in
21 investors’ funds from EDC III to NAFTAZI. (*Id.* at 4.) Ms. Misuraca further concluded
22 that Defendants disbursed approximately \$6,496,780.00 in EDC III investor funds for

1 purposes other than the ASPI Commerce Park project. (*Id.*) Specifically, Ms. Misuraca
2 found:

- 3 • Between April 2012 and June 2012, Mr. Chen transferred \$1.65 million in
4 investor funds to ASPI's TD Ameritrade account. (*Id.* at 23.) Mr. Chen used
5 the investor funds to satisfy margin calls for the TD Ameritrade account, which
6 were unrelated to the ASPI Commerce Park project. (*Id.* at 24, 26.) Mr. Chen
7 received \$2,400.00 in promotional gift cards, for personal use, as a result of the
8 transfers to the TD Ameritrade account. (*Id.* 24-25.) Of the \$1.65 million in
9 investor funds transferred to the TD Ameritrade account, approximately
10 \$1,160,000.00 were transferred back into EDC III accounts. (*Id.* at 26-27.)
11 Those funds did not remain in EDC III accounts for long, however. (*Id.* at 27.)
12 Some \$860,000.00 were transferred to Moses Lake 96000, an unrelated EB-5
13 project in the ASPI regional center. (*Id.*) The remainder was transferred to
14 NAFTAZI, only to be transferred, in large part, back to ASPI. (*Id.*) ASPI then
15 used a portion of those funds for non-EDC III purposes, including ASPI
16 payroll and credit card payments and other ASPI business ventures. (*Id.*) Ms.
17 Misuraca concludes that of the \$1.65 million in EDC III investor funds
18 transferred to the TD Ameritrade account, \$490,000.00 were never repaid to
19 EDC III. (*Id.* at 28.)
- 20 • In 2013, a total of \$2 million in investor funds were transferred to Moses Lake
21 96000. (*Id.*) Mr. Chen testified that the transfer constituted a loan for the
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1 purpose of completing EDC I's EB-5 project, which was unrelated to EDC III.
2 (*Id.*)

- 3 • In March 2012, Mr. Chen transferred \$150,000.00 in investor funds to his
4 cousin, who used the funds to refinance a personal home. (*Id.* at 28-29.) Mr.
5 Chen's cousin repaid the loan to EDC III in 2014. (*Id.*)
- 6 • In May 2012, Mr. Chen transferred \$166,537.70 in investor funds to Heritage
7 Bank, the lender to ASPI on a Fox Island, Washington venture that was
8 unrelated to EDC III's EB-5 project. (*Id.* at 29, 38.)
- 9 • Approximately \$149,018.00 in investor funds were transferred to Sun Basin
10 Orchards, an orchard owned by John Chen. (*Id.* at 30.) Of that sum,
11 approximately \$95,768.00 were transferred directly from an EDC III bank
12 account. (*Id.*) The remainder was first sent to ASPI and then transferred to
13 Sun Basin Orchards. (*Id.*) Sun Basin Orchards is unrelated to EDC III's EB-5
14 project. (*Id.*)
- 15 • Approximately \$118,250.00 in investor funds were transferred to EDC II for
16 purposes of an EB-5 project unrelated to EDC III. (*Id.*)
- 17 • In March 2015, approximately \$500,000.00 in investor funds were transferred
18 to Timberland Bank. (*Id.*)
- 19 • From 2012 to 2013, Mr. Chen transferred investor funds from EDC III
20 accounts to ASPI accounts to pay ASPI's corporate expenses. (*Id.* at 32.)
21 According to Ms. Misuraca's report, \$564,000.00 in investor funds were used
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1 to pay the wages of ASPI's six staff employees; compensate Tom Chen and
2 John Chen, ASPI board members, for insurance, transportation, dining, and
3 other benefits; and subsidize payroll expenses, such as taxes and social security
4 benefits. (*Id.* at 32-33.) Additionally, approximately \$190,730.00 in EDC III
5 investor funds were used to cover ASPI employees' health and dental
6 insurance. (*Id.*) Ms. Misuraca also concluded that approximately \$253,806.00
7 in EDC III investor funds were transferred to ASPI and then used to pay
8 ASPI's corporate credit card bills; approximately \$169,000.00 in investor
9 funds were transferred to ASPI and then used to pay ASPI's board members;
10 approximately \$29,250.00 in investor funds were transferred to ASPI and then
11 used to satisfy the financial obligations of other Chen family members;
12 approximately \$12,826.00 in investor funds were transferred to ASPI and then
13 used to cover Mr. Chen's payments on a BMW; approximately \$540,000.00 in
14 investor funds were transferred to ASPI and then paid to Junping Sun, an
15 investor in an unrelated EB-5 project administered by ASPI; and
16 approximately \$269,988.00 in investor funds were transferred to ASPI and
17 then disbursed to persons and entities uninvolved in EDC III's EB-5 project.
18 (*Id.* at 33-35.) Finally, Ms. Misuraca concluded that several hundred thousand
19 dollars in investor funds were transferred to ASPI and then wired to G and L
20 International and Rongying Wu for purposes unrelated to EDC III's EB-5
21 project. (*Id.* at 36.)
22

- Mr. Chen transferred approximately \$76,500.00 from EDC III accounts directly to other persons and entities apparently uninvolved in the ASPI Commerce Park EB-5 project. (*Id.* at 31.)
- Of the approximately \$7,566,535.00 in investor funds transferred to NAFTZI, approximately \$705,919.00 were used for non-EDC III purposes, including ASPI's payroll and credit card expenses. (*Id.* at 37-38.)

Finally, Ms. Misuraca found that NAFTZI failed to pay interest on the EDC III loan comprising investor funds. (*Id.* at 37.) Ms. Misuraca states that she “[did] not come across a single interest payment that was made to [EDC] III from NAFTZI between 2012 through September 30, 2016, even though it appears that a total of approximately \$7,566,535 had been loaned [to NAFTZI] and \$583,250 ha[d] been repaid by NAFTZI at that time.” (*Id.* at 37.)³

Defendants concede that Ms. Misuraca accurately traced each disbursement of EDC III investors' money. (*See* Def. Reply at 5; Def. Resp. at 8.) They do not provide an alternative expert report. (*See generally* Dkt.)

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³ Ms. Misuraca further opined that Mr. Chen prematurely utilized EB-5 investors' funds. (*Id.* at 17.) According to the Offering Documents, investors' funds would remain in escrow until investors' I-526 petitions were approved. (Program Mem. at 9; *see also* LLC Agreement at 1.) Ms. Misuraca found that, despite these representations, Mr. Chen disbursed approximately \$1.2 million in EDC III investor funds as a loan to EDC I, and approximately \$502,100.000 in EDC III investor funds as a loan to EVF, before USCIS approved those investors' I-526 petitions. (Misuraca Rep. at 18.) Neither EDC I nor EVF was involved in EDC III's EB-5 project. (*Id.* at 19.) EDC and EVF repaid the loan amounts to EDC III. (*Id.* at 19.) Relatedly, Ms. Misuraca concluded that EDC III loaned investor funds to NAFTZI before USCIS had approved any investor's I-526 petition. (*Id.* at 18.)

1 4. USCIS Actions

2 USCIS approved the first of the EDC III investors' I-526 petitions in January
3 2014. (Def. MSJ at 6; Misuraca Rep. at 18.) In total, USCIS approved 10 EDC III
4 investors' I-526 petitions. (Chen Decl. ¶ 34; Misuraca Rep. at 18.) USCIS records
5 suggest that USCIS has denied the remainder of EDC III investors' I-526 petitions.⁴
6 (Worland MSJ Decl. (Dkt. # 37) ¶ 10, Ex. 9 ("Not. of Intent to Terminate") at 5.) As of
7 June 20, 2018, seven EDC III investors had filed I-829 petitions. (*Id.* at 7.) To the
8 court's knowledge, USCIS has not approved any I-829 petition affiliated with EDC III.
9 (*See id.*; *see generally* Def. MSJ; Def. Reply; Def. Resp.)

10 In 2018, the USCIS Administrative Appeals Office ("Appeals Office") affirmed
11 the denials of six EDC III investors' I-526 petitions in non-precedent decisions.
12 (Worland Resp. Decl. ¶ 18, Ex. 17.1 ("*Matter of Y-L-*"); *id.*, Ex. 17.2 ("*Matter of F-C-*
13 *H-*"); *id.*, Ex. 17.3 ("*Matter of Y-T-*"); *id.*, Ex. 17.4 ("*Matter of M-C-H-*"); *id.*, Ex. 17.5
14 ("*Matter of W-C-*"); *id.*, Ex. 17.6 ("*Matter of H-J-Y-*").) In each appeal, the Appeals
15 Office concluded that the foreign investor was not EB-5-eligible because he or she "ha[d]
16 not satisfied the job creation requirements." (*Matter of Y-L-* at 3; *Matter of F-C-H-* at 3;
17 *Matter of Y-T-* at 3; *Matter of M-C-H-* at 3; *Matter of W-C-* at 3; *Matter of H-J-Y-* at 3.)
18 Specifically, the Appeals Office found that, "although [EDC III's] business plan was

19
20 ⁴ USCIS states that 31 investors filed I-526 petitions in connection with EDC III's EB-5
21 project and that USCIS denied 20 of those petitions. (Notice of Intent to Deny at 5.) It is not
22 clear whether all those petitions were denied on the merits or whether some were withdrawn.
Defendants contend that USCIS figures "fail to account for petition withdrawals . . . [and]
pending petitions[.]" (Def. Reply (Dkt. # 32) at 11.) The court also notes that Ms. Misuraca's
report states that 30 investors, not 31, invested in EDC III. (*See* Misuraca Rep. at 7-8.)

1 predicated on lending investor funds to complete construction” of Commerce Park 4,
2 NAFTAZI “completed the project without the use of the [investor’s] EB-5 capital.” (*See,*
3 *e.g., Matter of Y-L-* at 3.) Additionally, the Appeals Office observed discrepancies
4 among various estimates of the construction costs of Commerce Park 4. (*See, e.g., id.* at
5 7.)⁵ The Appeals Office concluded that, even if investors could show that NAFTAZI
6 would subsidize its purported construction expenditures with EB-5 funds, the investors’
7 petitions would remain deficient because “the proposed loan amount is more than the
8 alleged construction costs.” (*Id.*)

9 The Appeals Office also focused on the Offering Documents. According to the
10 Appeals Office, the Offering Documents appeared not to obligate EDC III to “loan the
11 entire amount” of each investor’s investment to NAFTAZI. (*See, e.g., id.* at 4.) The
12 Appeals Office pointed to language in the Confidential Program Memorandum, which
13 provided that EDC III would “loan *portions* of the pooled funds” to NAFTAZI. (*Id.*
14 (quoting Program Mem. at 4).) As a result, the Appeals Office concluded that, at the time
15 each investor filed his or her I-526 petition, “the documentation in the record did not
16 show” that EDC III “would make the full amount of [the investor’s] \$500,000 available”
17 to NAFTAZI. (*See, e.g., id.* at 4.)

18
19 ⁵ EDC III investors submitted documentation to USCIS stating that the costs of
20 constructing Commerce Park 4 amounted to \$7,760,196.00. (*See, e.g., id.* at 7.) The Appeals
21 Office noted that “[t]his number does not match any previously offered construction figures.”
22 (*Id.*) Neither does this figure match the total construction costs to which the parties have
stipulated. (*See* Stip. ¶ 5 (stipulating that NAFTAZI expended \$4,552,378.48 on construction
costs for Commerce Park 4).) As the court discusses below, *see infra* Section III.C.2.a, Mr.
Chen suggests that the ASPI Commerce Park project also required operating expenses and other
costs not reflected in the “hard construction costs.” (Chen Decl. ¶ 4.)

1 Separately, on June 20, 2018, USCIS issued to a “Notice of Intent to Terminate”
2 ASPI’s designation as a regional center on the ground that ASPI “no longer serves the
3 purpose of promoting economic growth.” (*See* Not. of Intent to Terminate at 3.) Citing
4 the SEC’s complaint in this action, USCIS asserted that ASPI’s “use of EB-5 investor
5 funds was not in accordance with the business plans, construction budget proposals, and
6 Economic Impact Assessment report [that ASPI] submitted to USCIS.” (*Id.* at 11.)
7 USCIS further declared that “[ASPI]’s practice of redistributing EB-5 investors’ . . .
8 funds to other projects and activities that may be unrelated to job creation has reduced the
9 credibility of its current project.” (*Id.* at 12.) Defendants contend that the Notice of
10 Intent to Terminate is replete with factual errors. (Def. Reply at 11-12.) They also
11 emphasize that USCIS has yet to issue a final determination on ASPI’s status as a
12 regional center. (*Id.*)

13 In response to the Notice of Intent to Terminate, Mr. Chen sent a letter to USCIS
14 defending ASPI and its EB-5 projects. (Worland MSJ Decl. ¶ 11, Ex. 10 (“Chen USCIS
15 Letter”).) Mr. Chen characterized the “diversion” of investor funds identified in the
16 Notice of Intent to Terminate and the SEC’s complaint as permissible exercises of
17 ASPI’s authority under the EB-5 program:

18 Once the loan was in place and secured by the designated real property, ASPI
19 viewed the funds as “working capital” and commingled the loan funds with
20 funding from other ASPI sources to complete the project. This is acceptable
21 with most government loans including the SBA and New Market Tax Credit
22 program. This is the “diversion” of funds that the SEC action refers to—and
the USCIS adjudicator refers to.

(*Id.* at 7.)

1 **C. The Cross-Motions**

2 The parties' cross-motions largely hinge on whether the Offering Documents
3 contained material misrepresentations or omissions. (*See, e.g.*, Def. MSJ at 6-7, 20-21;
4 Pl. MSJ at 7-12.) Defendants contend that the Offering Documents accurately described
5 a "loan model" of EB-5 investment pursuant to which ASPI could use investor funds "in
6 a manner it determined appropriate," as long as the loan from EDC III to NAFTZI was
7 secured by a first position deed of trust in ASPI Commerce Park. (Def. MSJ at 7.) In
8 contrast, the SEC contends that it is entitled to summary judgment because Defendants
9 misrepresented that EDC III investors' capital would be used in accordance with EB-5
10 requirements, only to misappropriate millions of dollars in investor funds. (Pl. MSJ at
11 7-8.)

12 **III. ANALYSIS**

13 **A. Summary Judgment Standard**

14 Summary judgment is appropriate if the evidence shows "that there is no genuine
15 dispute as to any material fact and the movant is entitled to judgment as a matter of law."
16 Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*
17 *Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the
18 outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A
19 factual dispute is "'genuine' only if there is sufficient evidence for a reasonable fact
20 finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986,
21 992 (9th Cir. 2001) (citing *Anderson*, 477 U.S. at 248-49).

22 //

1 The moving party bears the initial burden of showing there is no genuine dispute
2 of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at
3 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can
4 show the absence of such a dispute in two ways: (1) by producing evidence negating an
5 essential element of the nonmoving party’s case, or (2) by showing that the nonmoving
6 party lacks evidence of an essential element of its claim or defense. *Nissan Fire &*
7 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
8 bears the ultimate burden of persuasion at trial, it must establish a *prima facie* showing in
9 support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d
10 1465, 1471 (9th Cir. 1994). That is, the moving party must present evidence that, if
11 uncontroverted at trial, would entitle it to prevail on that issue. *Id.* at 1473. If the moving
12 party meets its burden of production, the burden then shifts to the nonmoving party to
13 identify specific facts from which a factfinder could reasonably find in the nonmoving
14 party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

15 The court is “required to view the facts and draw reasonable inferences in the light
16 most favorable to the [nonmoving] party.” *Scott v. Harris*, 550 U.S. 372, 378 (2007)
17 (internal quotation marks and citation omitted). The court may not weigh evidence or
18 make credibility determinations in analyzing a motion for summary judgment because
19 those are “jury functions, not those of a judge.” *Anderson*, 477 U.S. at 255.
20 Nevertheless, the nonmoving party “must do more than simply show that there is some
21 metaphysical doubt as to the material facts Where the record taken as a whole could
22 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue

1 for trial.” *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting *Matsushita*
2 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). Accordingly,
3 “mere allegation and speculation do not create a factual dispute for purposes of summary
4 judgment.” *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996). Nor can
5 “[c]onclusory allegations unsupported by factual data” defeat summary judgment. *Rivera*
6 *v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1078 (9th Cir. 2003).

7 When deciding cross-motions for summary judgment on the same claim, the court
8 must “rule[] on each party’s motion on an individual and separate basis, determining, for
9 each side, whether a judgment may be entered in accordance with the Rule 56 standard.”
10 *Tulalip Tribes of Wash. v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015) (quoting
11 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and*
12 *Procedure* § 2720 (3d ed. 1998)); *see also ACLU of Nev. v. City of Las Vegas*, 466 F.3d
13 784, 790-91 (9th Cir. 2006) (“We evaluate each motion separately, giving the nonmoving
14 party in each instance the benefit of all reasonable inferences.”) (citations and internal
15 quotation marks omitted).

16 **B. Securities Laws**

17 The SEC alleges that Defendants violated Section 10(b) of the Exchange Act, 15
18 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. The SEC further
19 alleges that Defendants violated Sections 17(a)(1), (2), and (3) of the Securities Act, 15
20 U.S.C. § 77q(a)(1)-(3). (Compl. ¶¶ 80-91.)

21 Section 10(b), Rule 10b-5, and Section 17(a) prohibit fraudulent conduct or
22 practices in connection with the offer or sale of securities. *See, e.g., SEC v. Dain*

1 *Rauscher, Inc.*, 254 F.3d 852, 855-56 (9th Cir. 2001). Under Section 10(b), it is unlawful
2 “[t]o use or employ, in connection with the purchase or sale of any security . . . any
3 manipulative or deceptive device or contrivance in contravention of such rules and
4 regulations as the Commission may prescribe.” 15 U.S.C. § 78j(b). Rule 10b-5, which
5 implements Section 10(b), classifies violations of the statute into three categories. *See*
6 *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). Specifically, Rule
7 10b-5 makes it unlawful:

8 (a) [t]o employ any device, scheme, or artifice to defraud[;]

9 (b) [t]o make any untrue statement of a material fact or omit to state a
10 material fact necessary in order to make the statements made, in light of
the circumstances under which they were made, not misleading[;] or

11 (c) [t]o engage in any act, practice, or course of business which operates or
12 would operate as a fraud or deceit upon any person, in connection with
the purchase or sale of any security.

13 17 C.F.R. § 240.10b-5. Section 17(a) of the Securities Act contains three subsections
14 “substantially identical” to the provisions of Rule 10b-5. *SEC v. Fitzgerald*, 135 F. Supp.
15 2d 992, 1027 (N.D. Cal. 2001) (citing 15 U.S.C. § 77q(a)).

16 Section 10(b), Rule 10b-5, and Section 17(a) require proof of the same essential
17 elements. *SEC v. Phan*, 500 F.3d 895, 907-08 (9th Cir. 2007) (citing *Rauscher*, 254 F.3d
18 at 855-56); *see also SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)
19 (noting that “[e]ssentially the same elements are required under Section 17(a)(1)-(3)” as
20 under Section 10(b) and Rule 10b-5). All forbid (1) making a material misstatement or
21 omission or employing a deceptive device or fraudulent scheme (2) in connection with
22 the offer or sale of a security (3) by means of interstate commerce. *Phan*, 500 F.3d at

1 907-08 (citing *Rauscher*, 254 F.3d at 855-56). Violations of Section 10(b), Rule 10b-5,
2 and Section 17(a)(1) require a showing of scienter. *Rauscher*, 254 F.3d at 856 (citing
3 *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980)). Violations of Sections 17(a)(2) and (3)
4 require a showing of negligence. *Rauscher*, 254 F.3d at 856 (citing *SEC v. Hughes*
5 *Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997)).

6 **C. The SEC's Motion for Summary Judgment**

7 The SEC moves for summary judgment on all liability issues. (SEC MSJ at 1.)
8 According to the SEC, there is no genuine dispute of material fact that, in violation of
9 Rule 10b-5(b) and Section 17(a)(2) of the Securities Act: (1) Defendants materially
10 misrepresented that they would spend investor funds in accordance with the requirements
11 of the EB-5 program; (2) those misrepresentations were made in connection with the
12 offer or sale of securities in interstate commerce; and (3) Defendants acted with scienter.
13 (*Id.* at 7-23.) Additionally, the SEC claims that the undisputed facts establish that
14 Defendants' conduct constitutes an illegal scheme to defraud under Rule 10b-5(a) and (c)
15 and Sections 17(a)(1) and (3) of the Securities Act. (*Id.* at 24.)

16 1. Securities

17 As a threshold matter, the court addresses whether membership interests in EDC
18 III constituted "securities" within the meaning of the securities laws. The Securities and
19 Exchange Acts define the term "security" to include, among other things, "any . . .
20 investment contract." 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10). "The basic test for
21 distinguishing transactions involving investment contracts from other commercial
22 dealings is 'whether the scheme involves an investment of money in a common enterprise

1 with profits to come solely from the efforts of others.” *SEC v. Liu*, No. 17-55849, 2018
2 WL 5308171, at *1 (9th Cir. Oct. 25, 2018) (quoting *United Housing Found., Inc. v.*
3 *Forman*, 421 U.S. 837, 852 (1975)). In the Ninth Circuit, shares in an EB-5 project may
4 constitute investment contracts if foreign investors “were promised a chance to earn a
5 profit,” even if that profit “was not their primary motivation.” *Liu*, 2018 WL 5308171, at
6 *2; *see also SEC v. Liu*, 262 F. Supp. 3d 957, 969-70 (C.D. Cal. 2017), *aff’d*, 2018 WL
7 5308171.

8 Here, the parties agree that the foreign investors’ primary motivation in investing
9 in EDC III was to obtain permanent residency. (*See, e.g.*, Pl. MSJ at 15; Ku Decl. (Dkt.
10 # 27) ¶ 4, Ex. 1 (“Zhang Decl.”) ¶ 2.) Nonetheless, there is no dispute that the Offering
11 Documents promised investors a chance to earn a profit, however minimal, in the form of
12 interest that accrued on the investor-funded loan from EDC III to NAFTAZI. (Subscription
13 Agreement at 3; LLC Agreement at 4; Program Mem. at 12); *see also Liu*, 2018 WL
14 5308171, at *2 (stating that investors were promised profits in the form of interest on the
15 investor-funded loan extended to the job-creating entity). Accordingly, following *Liu*,
16 2018 WL 5308171, at *1-2, the court concludes that Defendants sold securities within the
17 meaning of Section 10(b) of the Exchange Act, Rule 10b-5, and Section 17(a) of the
18 Securities Act.

19 2. Material Misstatements and Omissions

20 The SEC asserts that there is no genuine dispute of material fact that Defendants
21 made material misstatements and omissions in the Offering Documents “related to how
22 the investors’ money would be used to satisfy the USCIS requirements” under the EB-5

1 program. (*Id.* at 4.) The SEC further contends that those misstatements and omissions
2 are material as a matter of law because any reasonable EB-5 investor would, at the time
3 of investment, find it important to know whether his or her funds would be used for
4 non-EB-5 purposes. (*Id.* at 14-18.) The court begins by assessing whether Defendants
5 misstated facts in the Offering Documents or omitted facts necessary to make the
6 Offering Documents not misleading.

7 *a. Misstatements and Omissions in the Offering Documents*

8 In relevant part, the Offering Documents promised that Defendants would pool
9 investors' money to fund "Community Economic Development Loan(s) . . . to provide a
10 funding source for . . . new development project(s)" within the ASPI regional center,
11 "thereby enabling [investors] to qualify as Immigrant Investors under the . . . EB-5 visa
12 program." (Subscription Agreement at 2; LLC Agreement at 2; Program Mem. at 11.)
13 The Offering Documents further stated that each immigrant investor's capital would be
14 channeled to NAFTZI in the form of a secured loan, and that NAFTZI—the "Qualifying
15 Employment Creating Entity"—would use those funds to upgrade ASPI Commerce Park.
16 (LLC Agreement at 2; *see also id.* at 5 (estimating that the ASPI Commerce Park project
17 would create 230 direct and indirect jobs).) In other words, the Offering Documents
18 represented that Defendants would funnel investors' money into job creation in
19 satisfaction of EB-5 program requirements.

20 That representation was false. Defendants raised \$14,534,710.00 in investor
21 funds, of which \$13 million represented investor capital and just over \$1.5 million
22 represented fees. (Misuraca Rep. at 3.) Defendants channeled approximately \$7.5

1 million in investor funds to NAFTAZI. (*Id.* at 4.) But Defendants misappropriated at least
2 \$6.5 million in investors' money for uses contrary to the terms and purposes of the EB-5
3 program. (*See id.* at 3.) Ms. Misuraca's undisputed expert report shows that Defendants
4 used EDC III investors' money to finance unrelated EB-5 ventures, subsidize the salaries
5 and benefits of ASPI's employees, compensate ASPI's board members, pay ASPI's
6 corporate credit bills, and satisfy margin calls in ASPI's TD Ameritrade account. (*Id.* at
7 23-36.) Additionally, Defendants deployed investor funds in ways wholly unrelated to
8 ASPI's business operations. For instance, Defendants used investors' money to cover
9 Mr. Chen's BMW payments and satisfy the financial obligations of members of the Chen
10 family. (*Id.* at 34-35.) In short, Defendants repeatedly offended the EB-5 program's
11 baseline requirement that the full amount of investor capital be channeled into job
12 creation. (*See* USCIS Policy Manual, Ch. 2 at 7.) In so doing, Defendants rendered false
13 the Offering Documents' central premise that Defendants would utilize investors' money
14 in such a way as to "enabl[e]" investors to qualify for EB-5 status. (*See* Subscription
15 Agreement at 2.)

16 Defendants concede that Ms. Misuraca accurately traced their use of EDC III
17 investors' money. (*See* Def. Resp. at 8 (noting Ms. Misuraca's expert report on "the use
18 of [investors'] money . . . has never been contested by defendants"); *id.* at 13
19 ("Defendants have never disputed the use of funds set forth in the expert report[.]" ; Def.
20 Reply at 5 ("Defendants have never contested where or how the funds were used.").)
21 However, Defendants assert a litany of reasons why the court should find that Defendants

22 //

1 fully complied with the terms of the Offering Documents and the EB-5 program. None
2 reveals a genuine issue for trial.

3 First, Defendants emphasize that the investor-backed loan from EDC III to
4 NAFTAZI was secured by a first position deed of trust on ASPI Commerce Park. (Def.
5 Resp. at 2, 8; Def. MSJ at 15.) The argument is unavailing. To begin, the undisputed
6 record shows that Defendants loaned only a portion of investor funds to NAFTAZI.
7 (Misuraca Rep. at 3-4.) Thus, contrary to Defendants' representations, some investors'
8 capital was not "fully secured" by an interest in real property. (*See* Def. Resp. at 3.)
9 Moreover, the security interest is irrelevant to whether Defendants misrepresented how
10 they intended to use investors' money. The first position deed of trust ostensibly
11 guaranteed that investors could recover their capital in the event of default (*see* Def. MSJ
12 at 7); it in no way ensured that Defendants would actually channel investor funds into the
13 ASPI Commerce Park project. Put otherwise, that Defendants afforded some investors a
14 security interest in real property does not immunize Defendants from liability for material
15 misrepresentations in the Offering Documents.

16 Defendants also argue that they performed under the Offering Documents exactly
17 what investors were promised: EDC III loaned investor funds to NAFTAZI, which
18 completed the Commerce Park 4 project and created "hundreds" of new jobs. (Def. MSJ
19 at 6.)⁶ As a result, Defendants contend, the court cannot find that Defendants

21 ⁶ Defendants do not make this argument at length in their opposition to the SEC's motion
22 for summary judgment, but raise it in their motion for summary judgment. (*See generally* Def.
Resp.; *see also* Def. MSJ at 6, 11, 18-19.) Because Defendants' opposition incorporates their
motion for summary judgment (*see* Def. Resp. at 1), the court addresses the argument here.

1 misrepresented how they intended to use EDC III investors' funds. (*See id.* at 18-19.)

2 The court disagrees.

3 Defendants do not contest that EDC III loaned NAFTAZI only about \$7.5 million of
4 the approximately \$13 million in investor capital Defendants raised. (*See* Misuraca Rep.
5 at 4.) Defendants also concede that they expended just \$4.5 million to construct
6 Commerce Park 4. (Stip. ¶ 5.) Mr. Chen suggests that the ASPI Commerce Park project
7 also demanded expenditures for “land, infrastructure, soft costs, project management and
8 operating expenses, interest, contingencies, and overhead” not reflected in the “hard
9 construction costs.” (Chen Decl. ¶ 4.) But Defendants provide no evidence that they
10 utilized investors' money for any such expenses. *See Rivera*, 331 F.3d at 1078
11 (“Conclusory allegations unsupported by factual data cannot defeat summary
12 judgment.”). Even taking Defendants at their word, the court is left with this undisputed
13 fact: the cost of the ASPI Commerce Park project amounted to significantly less than the
14 total investor capital Defendants raised. (*See* Misuraca Rep. at 3; Stip. ¶ 5.) As a result,
15 some EDC III investors have nothing to show for their investment in EDC III. (*See, e.g.,*
16 *Matter of Y-L-* at 3 (finding that NAFTAZI “completed the project without the use of [the
17 investor’s] EB-5 capital”).) Mere completion of the project does not absolve Defendants
18 of misappropriating investor funds.

19 Relatedly, Defendants assert that the Offering Documents vested Defendants with
20 virtually unbounded authority to dispense investor funds as they saw fit. Specifically,
21 Defendants insist that ASPI and NAFTAZI “could use the loan proceeds in a manner [they]
22 determined appropriate under the circumstances,” as long as the EDC III loan was

1 secured by an interest in ASPI Commerce Park. (Def. MSJ at 7; *see also* Def. Resp. at 13
2 (disputing that “any use of funds was outside the scope set forth in the Offering
3 Documents”).) The court acknowledges that some parts of the Offering Documents
4 appear to contemplate the deployment of investors’ capital to multiple job-creating
5 entities. (*See, e.g.*, Program Mem. at 13.) The court also observes that the Offering
6 Documents did not expressly guarantee that EDC III would make the entire amount of
7 investor funds available to NAFTAZI, as the USCIS Appeals Office emphasized in
8 denying EDC III investors’ appeals. (*See, e.g., Matter of Y-L-* at 4.) Nonetheless, the
9 Offering Documents’ overriding focus on the ASPI Commerce Park project, combined
10 with its pledge to “enabl[e] Member Managers [of EDC III] to qualify as Immigrant
11 Investors under . . . the EB-5 visa program,” render Defendants’ reading of the
12 Documents untenable. (*See* Subscription Agreement at 2; LLC Agreement at 2; Program
13 Mem. at 11.) Under the Offering Documents, any discretion Defendants enjoyed with
14 respect to investors’ money was bounded by EB-5 program requirements—*i.e.*, that the
15 “full amount” of each investor’s \$500,000.00 investment be “made available” to the
16 entity responsible for creating the jobs on which the investor’s petition is based. (USCIS
17 Policy Manual, Ch. 2 at 7.) No reasonable juror could conclude that the Offering
18 Documents gave Defendants a license to spend substantial sums of investors’ money for
19 ASPI’s general business expenses, unrelated EB-5 projects, and personal use.

20 In light of the above, the court finds that the misrepresentations in the Offering
21 Documents took two forms: (1) Defendants falsely promised that they would loan each
22 EDC III investor’s capital to NAFTAZI to finance the ASPI Commerce Park project in

1 accordance with EB-5 program requirements; and (2) Defendants failed to disclose that
2 they would deploy investor funds for purposes contrary to the EB-5 program, thereby
3 rendering the Offering Documents misleading. The court now considers whether those
4 misstatements and omissions were material.

5 *b. Materiality*

6 “The antifraud provisions’ materiality element is satisfied only if there is ‘a
7 substantial likelihood that the disclosure of the omitted fact would have been viewed by
8 the reasonable investor as having significantly altered the ‘total mix’ of information made
9 available.’” *Phan*, 500 F.3d at 908 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32
10 (1988)). Materiality determinations require “delicate assessments of the inferences a
11 ‘reasonable shareholder’ would draw from a given set of facts and the significance of
12 those inferences to him, and these assessments are peculiarly ones for the trier of fact.”
13 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Nevertheless, a court may
14 resolve the issue of materiality as a matter of law when “the established omissions are so
15 obviously important to an investor, that reasonable minds cannot differ on the question of
16 materiality.” *Id.* (quotation marks and citation omitted).

17 The district court’s decision in *SEC v. Liu*, 262 F. Supp. 3d at 971-72, a securities
18 enforcement action involving the EB-5 program, is instructive. In documents provided to
19 foreign investors, the *Liu* defendant promised to loan investors’ capital to a job-creating
20 entity that would build and operate a cancer treatment center. *Id.* at 961. Instead of
21 building the treatment center, the defendant diverted over \$20 million in investors’
22 money to himself, his wife, and various marketing companies. *Id.* at 960. On summary

1 judgment, the court found that “[s]uch vast misappropriation is fundamentally
2 inconsistent with the EB-5 program and would dramatically undermine the project’s
3 viability and therefore threaten investors’ ability to obtain visas.” *Id.* at 971.

4 Accordingly, the court concluded, “any reasonable EB-5 investor would deem the
5 omissions and misrepresentations in the [offering documents] material.” *Id.* at 971-972.

6 Defendants insist that *Liu* “has no applicability to the present action.” (Def. Resp.
7 at 13.) The court acknowledges that the facts of this case depart from *Liu* in certain
8 respects. To begin, as Defendants emphasize, the foreign investors in *Liu* apparently did
9 not hold a security interest in real property in exchange for their investment. (*Id.* at 12);
10 *Liu*, 262 F. Supp. 3d at 961-964. Moreover, at the time the *Liu* court rendered its
11 decision, the defendants had performed “no construction” on the cancer treatment center.
12 *Liu*, 262 F. Supp. 3d at 964. Here, in contrast, Defendants assert that Commerce Park 4
13 is fully completed. (Def. Resp. at 12.)

14 Ultimately, however, those differences are superficial. On the issue of materiality,
15 this case is no different from *Liu*. Foreign investors invested in EDC III because they
16 wanted to obtain EB-5 status and, eventually, lawful permanent residency in the United
17 States. (*See, e.g.*, Zhang Decl. ¶ 2 (stating that “the sole purpose of the investment [in
18 EDC III] was to get green cards for my family”).) In other words, but for the opportunity
19 to earn EB-5 status, investors would not have invested in EDC III. Yet, Defendants
20 diverted investors’ funds in ways that offended the essential requirements of the EB-5
21 program. In so doing, Defendants may well have jeopardized numerous EDC III
22 investors’ immigration prospects. (*See Matter of Y-L-; Matter of F-C-H-; Matter of Y-T-;*

1 *Matter of M-C-H-; Matter of W-C-; Matter of H-J-Y-.*) Just as in *Liu*, there is no genuine
2 dispute that, at the time of the investment decision, a reasonable EB-5 investor would
3 have found it important to know that Defendants would use his or her money for
4 purposes fundamentally at odds with the EB-5 program. *See Liu*, 262 F. Supp. 3d at
5 971-72.

6 Even construing the record in Defendants' favor, the court finds that Defendants
7 do not provide evidence capable of raising a genuine dispute of material fact bearing on
8 materiality. In opposing the SEC's motion, Defendants emphasize that 10 EDC III
9 investors, each of whom holds an approved I-526 petition, have submitted declarations
10 that purport to approve of Defendants' handling of their investments in EDC III. (Def.
11 Resp. at 9; *see also* Zhang Decl; Ku Decl. ¶ 4, Ex. 2 ("Lin Decl."); *id.* Ex. 3 ("Sun
12 Decl."); *id.* Ex. 4 ("Pan Decl."); *id.* Ex. 5 ("Wang Decl."); *id.* Ex. 6 ("Chen Decl."); *id.*
13 Ex. 7 ("Long Decl."); *id.* Ex. 8 ("Huang Decl."); *id.* Ex. 9 ("Chung Decl."); *id.* Ex. 10
14 ("Kim Decl."); Zhang 2d Decl. (Dkt. # 28).) In pertinent part, each of the 10 declarations
15 states:

16 I am fully satisfied with Andy Chen's management of my investment and his
17 efforts to help me and my family get green cards, which is my primary
investment objective. . . .

18 My investment in [EDC III] was based upon my understanding [that EDC
19 III] would loan funds to NAFTAZI and hold a security interest in sufficient
20 property to fully secure the loan. Under these circumstances I have no issue
21 with or objection to NAFTAZI/ASPI utilizing loaned funds for its business or
other purposes. As a fully secured loan, NAFTAZI/ASPI had control of loan
proceeds and could use those proceed with other NAFTAZI/ASPI assets to
fulfill the obligations to the Company.

22 //

1 (Zhang Decl. ¶¶ 8, 10; Lin Decl. ¶¶ 8, 10; Sun Decl. ¶¶ 8, 10; Pan Decl. ¶¶ 8, 10; Wang
2 Decl. ¶¶ 8, 10; Chen Decl. ¶¶ 8, 10; Long Decl. ¶¶ 8, 10; Huang Decl. ¶¶ 8, 10; Chung
3 Decl. ¶¶ 8, 10; Kim Decl. ¶¶ 8, 10.) Additionally, Defendants claim that several EDC III
4 investors “ratified” Defendants’ uses of investor funds after the SEC began its
5 investigation. (Def. Resp. at 9; Def. MSJ at 22-23; Ku Decl. ¶ 5, Ex. 11 (stating that
6 EDC III investors “ratify and approve all actions undertaken by ASPI and its subsidiaries
7 from and after formation of [EDC III]”).)

8 Neither the investor declarations nor the ratifications are relevant to the question
9 before the court: whether, at the time of investment, a reasonable EB-5 investor would
10 have found that the misrepresentations and omissions in the Offering Documents altered
11 the “total mix” of information available to that investor. *See Phan*, 500 F.3d at 908. To
12 begin, the declarations offer *post hoc* endorsements of Defendants’ conduct, written by
13 the few EDC III investors whose I-526 petitions USCIS approved. They do not speak to
14 the mind of a prospective EDC III investor at the time of the investment decision. *See*,
15 *e.g.*, *SEC v. Platforms Wireless Int’l Corp.*, 559 F. Supp. 2d 1091, 1097 (S.D. Cal. 2008)
16 (noting that information is material if “a reasonable investor would want to know [it],
17 *before* making an investment decision”) (emphasis added); *SEC v. Murphy*, 626 F.2d 633,
18 653 (9th Cir. 1980) (stating that the materiality inquiry must reflect the viewpoint of a
19 “prospective purchaser”). The ratifications suffer the same defect. Relatedly, the
20 declarations and ratifications are silent on the immigration-related implications of
21 Defendants’ misappropriation of investor funds. Unsurprisingly, no investor suggests
22 that he or she would have invested in EDC III even if the investor had known that

1 Defendants would deploy investor funds for non-EB-5 purposes. Finally, to the extent
2 the declarants sanction Defendants' use of investor funds for ASPI's general operational
3 expenses and "other purposes," they premise that approval upon the existence of "a
4 security interest in sufficient property to fully secure the loan" from EDC III to NAFTAZI.
5 (*See, e.g.,* Zhang Decl. ¶ 10.) Yet, the SEC's uncontroverted evidence shows that
6 Defendants loaned only a little more than half of investors' funds to NAFTAZI, apparently
7 rendering some investors' funds not fully secured. (*See* Misuraca Rep. at 3-4.) On this
8 point, then, the declarations actually favor the SEC.

9 In sum, construing the evidence in the light most favorable to Defendants, the
10 court finds that there is no genuine dispute that Defendants misrepresented in the
11 Offering Documents that they would use investors' funds in accordance with EB-5
12 program requirements, such that investors would become eligible to seek EB-5 status.
13 Moreover, the court concludes that those misrepresentations were material as a matter of
14 law.

15 3. In Connection with the Sale of Securities

16 The SEC argues there is no genuine dispute of material fact that Defendants made
17 the misrepresentations in the Offering Documents "in connection with" the sale of
18 securities. (Pl. MSJ at 12-13 ("The 'in connection with' element is met here because
19 Defendants' misrepresentations coincided with the Defendants' sales of membership
20 interests in EDC III.")) The court agrees.

21 "[A] 'misrepresentation or omission of material fact' is made 'in connection with
22 the purchase or sale' of a security when the 'fraud coincided with the sales [or purchases]

1 themselves.’” *Chadbourn & Park LLP v. Troice*, 571 U.S. 377, 404 (2014) (quoting
2 *SEC v. Zandford*, 535 U.S. 813, 820 (2002)) (alterations in original). Defendants
3 concede that foreign investors received the Offering Documents before investing in EDC
4 III. (Def. Resp. at 18.) Thus, there is no dispute that Defendants made the
5 misrepresentations in the Offering Documents in connection with investors’ purchase of
6 membership interests in EDC III. *See Chadbourne*, 571 U.S. at 404.

7 4. By Means of Interstate Commerce

8 The SEC further argues there is no dispute that Defendants used means of
9 interstate commerce to defraud EDC III investors. Specifically, the SEC contends that
10 Exhibit 2 to Ms. Misuraca’s expert report, a spreadsheet documenting the flow of
11 investor funds, establishes that “essentially all of the EDC III investor deposits came into
12 the ASPI/EDC III bank account through wire transfers.” (Pl. MSJ at 18 (citing Worland
13 MSJ Decl. ¶ 12, Ex. 11 (“Misuraca Rep. Ex. 2”)).) Defendants acknowledge “that all of
14 the EDC III investor deposits came into the ASPI/EDC III bank account through wire
15 transfers.” (Def. Resp. at 18.)

16 In a securities fraud case, a plaintiff may satisfy the interstate requirement by
17 demonstrating that Defendants used the banking system—or any other instrumentality of
18 interstate commerce—“in furtherance of the alleged fraud.” *Hilton v. Mumaw*, 522 F.2d
19 588, 602 (9th Cir. 1975) (emphasizing that the use of an instrumentality of interstate
20 commerce need not itself be a fraudulent act); *see also Shepherd v. S3 Partners, LLC*,
21 No. C-09-01405 RMW, 2011 WL 4831194, at *6 (N.D. Cal. Oct. 12, 2011) (denying
22 summary judgment on jurisdictional grounds to the defendants in a securities fraud

1 action, where the plaintiffs showed that the defendants obtained the funds at issue via
2 wire transfer). Here, the SEC's uncontroverted evidence establishes that Defendants
3 obtained virtually all investor funds by means of wire transfers. (See Misuraca Rep. Ex.
4 2.) The court thus finds Defendants used the banking system "in furtherance of" their
5 misrepresentations to foreign investors and that the interstate commerce requirement is
6 satisfied. See *Hilton*, 522 F.2d at 602.

7 5. Scienter

8 To prove that a defendant violated Section 10(b) of the Exchange Act, Rule 10b-5,
9 or Section 17(a)(1) of the Securities Act, the SEC must show that the defendant acted
10 with scienter. See, e.g., *Vernazza v. SEC*, 327 F.3d 851, 860 (9th Cir. 2003). In contrast,
11 negligence suffices to support a violation of Sections 17(a)(2) and (3) of the Securities
12 Act. See *Rauscher*, 254 F.3d at 856 (citing *Hughes Capital*, 124 F.3d at 453-54); see also
13 15 U.S.C. § 77q(a)(2)-(3). The SEC asserts that there is no genuine dispute of material
14 fact that Defendants acted with scienter in misleading EDC III investors about the
15 intended uses of investors' funds. (Pl. MSJ at 18-23.)

16 "Scienter can be established by intent, knowledge, or in some cases
17 'recklessness.'" *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir.
18 2010) (citing *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990)
19 (en banc)); see also *Vernazza*, 327 F.3d at 860 (explaining that scienter may be
20 established by "'knowing or reckless conduct,' without a showing of 'willful intent to
21 defraud'") (quoting *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978)).
22 Recklessness constituting scienter "is conduct that consists of a highly unreasonable act,

1 or omission, that is an ‘extreme departure from the standards of ordinary care, and which
2 presents a danger of misleading buyers or sellers that is either known to the defendant or
3 is so obvious that the actor must have been aware of it.’” *Rauscher*, 254 F.3d at 856
4 (quoting *Hollinger*, 914 F.2d at 1569). In other words, “[s]cienter may be established . . .
5 by showing that the defendants knew their statements were false, or by showing that [the]
6 defendants were reckless as to the truth or falsity of their statements.” *Gebhart v. SEC*,
7 595 F.3d 1034, 1041 (9th Cir. 2010). Scienter thus implicates “‘a subjective inquiry’
8 turning on ‘the defendant’s actual state of mind.’” *Platforms Wireless*, 617 F.3d at 1093
9 (quoting *Gebhart*, 595 F.3d at 1042).

10 The SEC argues that three pieces of evidence establish that Mr. Chen acted with
11 scienter. (*See* Pl. MSJ at 20-23.) First, the SEC furnishes the minutes of a 2009 ASPI
12 board meeting in which Mr. Chen described his understanding of permissible uses of
13 investors’ EB-5 funds. (Worland MSJ Decl. ¶ 16, Ex. 15 (“ASPI Minutes”).)

14 Specifically, Mr. Chen stated:

15 Provided that the loan is not in default and the security for the note is in
16 effect, the use of the promissory note funds is, basically, unrestricted. Given
17 the environment that ASPI is a very small company, this provides ASPI with
18 the accounting flexibility to combine vendor accounts, payables, receivables,
19 and payroll expenses into single accounts. Of course, internal accounting
20 would still be maintained to track funding from each regional center investor
21 pool, but would allow ASPI complete discretion during the five year loan
22 period to allocate borrowed funds as it saw fit and to make decisions on how
23 revenues (leasing income) and related expenses are allocated.

20 (*Id.* at 6.) Mr. Chen went on to declare that ASPI would enjoy “flexibility . . . to place
21 excess funds in temporary/short-term uses or to move funds between projects as may be
22 deemed necessary to accommodate short term cash flow management.” *Id.* Additionally,

1 the SEC submits portions of Mr. Chen’s deposition in which he conceded that he never
2 sought the advice of attorneys or others familiar with the EB-5 program to ensure that his
3 understanding of ASPI’s discretion to spend investor funds accorded with EB-5
4 requirements. (Worland MSJ Decl. ¶ 17, Ex. 16 (“Chen Dep.”) at 170:3-171:12.)
5 Finally, the SEC draws attention to Mr. Chen’s letter to USCIS in response to the Notice
6 of Intent to Terminate ASPI’s regional center status. In that letter, Mr. Chen defended his
7 use of EB-5 investor funds as “‘working capital’” and acknowledged that he
8 “‘commingled the loan funds with funding from other ASPI sources.” (Chen USCIS
9 Letter at 7.)

10 Defendants provide no additional evidence bearing Mr. Chen’s intent or state of
11 mind. (*See generally* Def. Resp.; Def. MSJ.) Rather, Defendants again fixate upon the
12 security interest in real property that EDC III investors purportedly enjoyed. (Def. Resp.
13 at 21-22.) According to Defendants, the 2009 ASPI board meeting minutes “explain the
14 intent to restructure the ASPI Regional Center from an ‘equity model’ to a ‘loan model’”
15 under which investors’ capital contributions would be secured by an interest in real
16 property. (*Id.* at 21.) Defendants further suggest that “the fact that the EDC III loan is
17 fully and completely secured” precludes the court from granting summary judgment to
18 the SEC on the issue of scienter. (*Id.* (“Why would a party intending to defraud investors
19 and use their money for ‘something else’ provide a fully collateralized deed of trust
20 security interest in real estate fully protecting the investors['] investment and providing
21 private remedies in the event of default?”).) Put otherwise, Defendants appear to suggest
22 they held a subjective, good faith belief that there was nothing wrong with using

1 investors' funds for non-EB-5 purposes as long as those funds remained fully secured.

2 (*See id.*)

3 The court is not persuaded that EDC III investors' purported security interest in
4 ASPI Commerce Park is relevant to the scienter inquiry. The first position deed of trust
5 ensured that investors would not walk away emptyhanded in the event of default. It has
6 no bearing on whether Defendants recklessly disregarded the risk that the Offering
7 Documents' assurances of compliance with the EB-5 program were false or misleading.
8 Just as the fact that investors held a security interest in real property cannot immunize
9 Defendants from liability for false and misleading representations in the Offering
10 Documents, it cannot operate to neutralize scienter. In any event, as emphasized above,
11 the SEC's uncontroverted evidence shows that Defendants did not loan all of the EDC III
12 investors' funds to NAFTAZI (*see* Misuraca Rep. at 3-4), leaving some investors not
13 secured in the full amount of their investment.

14 Construing the record in the light most favorable to Defendants, the court
15 concludes that there is no genuine dispute that Defendants acted with recklessness
16 constituting scienter. To begin, the court finds that the objective unreasonableness of
17 Defendants' conduct raises an inference of scienter. *See Gebhart*, 595 F.3d at 1041
18 (explaining that a court "may consider the objective unreasonableness of the defendant's
19 conduct to raise an inference of scienter"). Mr. Chen's statements in the ASPI board
20 meeting and letter to USCIS demonstrate that he solicited EB-5 investors' money with
21 the subjective intent to deploy those funds at ASPI's "complete discretion," contrary to
22 the terms of the EB-5 program. (*See* ASPI Minutes at 6; *see also* Chen USCIS Letter at

1 7.) By any measure, Mr. Chen’s understanding of his control over EB-5 investors’ funds
2 was objectively unreasonable: it contravened the EB-5 program’s core requirement that
3 the full amount of an EB-5 investor’s capital contribution be channeled into the entities
4 responsible for creating the employment upon which the investor’s petition is based. (*See*
5 USCIS Policy Manual, Ch. 2 at 7.)

6 The court further concludes that no reasonable juror could doubt that Mr. Chen
7 was “consciously” reckless in disregarding the risk that the Offering Documents’
8 assurances of compliance with the EB-5 program were false. *See Platforms Wireless*,
9 617 F.3d at 1093. Even assuming Mr. Chen held a good faith belief that he could
10 discretionarily spend EB-5 funds as working capital, certain expenditures of EDC III
11 investors’ money were so obviously beyond the pale—*i.e.*, payments on his BMW and
12 loans to family members—that Mr. Chen “must have been aware” that he was falsifying
13 the Offering Documents’ representations to foreign investors. *Id.* (quoting *Hollinger*, 914
14 F.2d at 1569); *see also Roth v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 46 n.13
15 (2d Cir. 1978) (stating that “[a] refusal to see the obvious, a failure to investigate the
16 doubtful, if sufficiently gross,” may furnish evidence of scienter). In diverting investors’
17 money for unquestionably personal purposes, Mr. Chen not only violated the essential
18 terms of the EB-5 program, but also contravened the unreasonably liberal understanding
19 of permissible uses of EB-5 funds he expressed in the ASPI board meeting. (*See ASPI*
20 *Minutes* at 6.) Such disregard is “more egregious than even ‘white heart/empty head’
21 good faith,” *Hollinger*, 914 F.2d at 1569, and establishes beyond genuine dispute that Mr.
22 Chen acted with recklessness constituting scienter.

1 More broadly, the uncontroverted evidence shows that Mr. Chen knew that he
2 could not verify the truth of the Offering Documents' central premise that Defendants
3 would spend investors' funds in such a way as to "enabl[e]" investors to qualify for EB-5
4 status. (*See* Subscription Agreement at 2.) A defendant's failure to perform a
5 "meaningful independent investigation to confirm the truth of [the defendant's]
6 representations" to investors may establish that the defendant was "consciously aware
7 that [he] lacked sufficient information for [his] statements." *Gebhart*, 595 F.3d at 1044.
8 That, in turn, may support a finding of scienter. *Id.*; *see also SEC v. Bremont*, 954 F.
9 Supp. 726, 730 (S.D.N.Y. 1997) (stating that a defendant may act with scienter where the
10 defendant fails to "make the slightest attempt to verify" fraudulent information given to
11 investors).

12 Such is the case here. At his deposition, Mr. Chen expressed little confidence that
13 his conception of the "loan model" of EB-5 investment accorded with USCIS
14 requirements; he conceded that it was "kind of [his] understanding" that USCIS
15 sanctioned discretionary spending of EB-5 investors' money. (Chen Dep. at 167:25.)
16 Yet, Mr. Chen failed to consult with an attorney—or anyone else—to ensure that such
17 unfettered control over investor funds was consistent with the EB-5 program and federal
18 securities laws. (*Id.* at 164:10-165:11, 170:3-171:12.) In other words, Mr. Chen did
19 nothing to confirm the truth of the Offering Documents' assurance that Defendants would
20 abide by the requirements of the EB-5 program—despite soliciting millions of dollars of
21 other people's money for a project with potentially decisive consequences for those
22 individuals' immigration prospects. In light of those omissions, any reasonable juror

1 would conclude that Mr. Chen acted with conscious or deliberate recklessness in
2 disregarding the risk that the Offering Documents' representations were false. *See*
3 *Gebhart*, 595 F.3d at 1042-44. Accordingly, the SEC is entitled to summary judgment on
4 the issue of scienter.

5 By extension, the court finds that Defendants acted with negligence in violation of
6 Sections 17(a)(2) and (3) of the Securities Act. For the reasons discussed above, there is
7 no genuine dispute that Defendants "depart[ed] from the standards of ordinary care" in
8 misrepresenting the intended uses of investors' funds. *Liu*, 262 F. Supp. 3d at 972. Any
9 reasonable solicitor of EB-5 funds would have ensured that he understood the permissible
10 uses of investors' money and that documents given to potential investors accurately
11 reflected how he planned to spend that money. The undisputed evidence establishes that
12 Mr. Chen failed to consult anyone with knowledge of the EB-5 program about
13 permissible uses of investors' money; failed to accurately represent how Defendants
14 intended to use investors' money; and failed to channel the full amount of EDC III
15 investors' capital contributions into job-creating entities, contrary to the essential
16 requirements of the EB-5 program. *See supra* Sections III.C.2. The SEC is thus entitled
17 to summary judgment on the issue of negligence.

18 6. Device, Scheme, or Artifice to Defraud

19 The SEC also moves for summary judgment on their claims that Defendants'
20 conduct constituted an illegal scheme to defraud under Rule 10b-5(a) and (c) and
21 Sections 17(a)(1) and (3) of the Securities Act. (Pl. MSJ at 24.) "Under Rule 10b-5(a) or
22 (c), a defendant who uses a 'device, scheme, or artifice to defraud,' or who engages in

1 ‘any act, practice, or course of business which operates or would operate as a fraud or
2 deceit’ may be liable for securities fraud.” *WPP Lux. Gamma Three Sarl v. Spot Runner,*
3 *Inc.*, 655 F.3d 1039, 1057 (9th Cir. 2011) (quoting 17 C.F.R. § 240.10b-5). Sections
4 17(a)(1) and (3) of the Securities Act similarly prohibit “scheme liability.” *SEC v.*
5 *Fraser*, No. CV-09-00443-PHZ-GMS, 2009 WL 2450508, at *9 (D. Ariz. Aug. 11,
6 2009); *see also Fitzgerald*, 135 F. Supp. 2d at 1028-29 (distinguishing between
7 misstatements and omissions constituting violations of Rule 10b-5(b) and Section
8 17(a)(2), on the one hand, and scheme liability under Rule 10b-5(a) and (c) and Section
9 17(a)(1) and (3), on the other).

10 “Courts have generally held that ‘a Rule 10b-5(a) and/or (c) claim cannot be
11 premised on the alleged misrepresentations or omissions that form the basis of a Rule
12 10b-5(b) claim.’” *WPP Lux.*, 655 F.3d at 1057 (quoting *Lautenberg Found. v. Madoff*,
13 No. 09-816 (SRC), 2009 WL 2928913, at *12 (D.N.J. Sept. 9, 2009)). Rather, “[a]
14 defendant may only be liable as part of a fraudulent scheme based upon
15 misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also
16 encompasses conduct beyond those misrepresentations or omissions.” *WPP Lux.*, 655
17 F.3d at 1057; *see also SEC v. Kelly*, 817 F. Supp. 2d 340, 344 (S.D.N.Y. 2011) (“Scheme
18 liability under subsections (a) and (c) of Rule 10b-5 hinges on the performance of an
19 inherently deceptive act that is distinct from an alleged misstatement.”).

20 The SEC fails to explain how Defendants’ alleged scheme to defraud EB-5
21 investors “hinge[d] on the performance of an inherently deceptive act” distinct from the
22 misrepresentations in the Offering Documents. *See id.*; (*see generally* Pl. MSJ.)

1 Accordingly, the court finds that the SEC is not entitled to summary judgment on their
2 claims under Rule 10b-5(a) and (c) and Sections 17(a)(1) and (3) of the Securities Act.

3 * * *

4 In sum, the court finds there is no genuine dispute of material fact that Defendants,
5 acting with scienter, made material misrepresentations and misleading omissions in
6 connection with the sale of securities by means of interstate commerce. Accordingly, the
7 court GRANTS summary judgment to the SEC on its claims under Rule 10b-5(b) and
8 Section 17(a)(2) of the Securities Act. The court DENIES the SEC's motion for
9 summary judgment on the SEC's claims Rule 10b-5(a) and (c) and Sections 17(a)(1) and
10 (3) of the Securities Act.⁷

11 **D. Defendants' Motion for Summary Judgment**

12 Defendants argue that they are entitled to summary judgment because the Offering
13 Documents contain no material misstatements or omissions as a matter of law and the
14 SEC adduces no evidence that Defendants acted with "intent to defraud." (Def. MSJ at
15 20-21.) Additionally, Relief Defendants assert that they are "[i]mproperly [j]oined." (*Id.*
16 at 23.) In light of the court's decision on the SEC's motion for summary judgment, the
17 court DENIES Defendants' motion for summary judgment with respect to material

18 //

19 ⁷ In its reply, the SEC moves to strike portions of the third declaration of Mr. Chen and
20 the declaration of immigration lawyer Duncan Millar, which are submitted in support of
21 Defendants' opposition to the SEC's motion for summary judgment. (Pl. Reply at 7-9; *see also*
22 Chen Resp. Decl. (Dkt. # 40); Millar Decl. (Dkt. # 41).) The court finds the challenged portions
of Mr. Chen's declaration and Mr. Millar's declaration do not alter the court's determination of
the merits of the SEC's summary judgment motion. Accordingly, the court DENIES as moot the
SEC's evidentiary objections.

1 misrepresentations and scienter. *See supra* Section III.C. The court proceeds to assess
2 Relief Defendants’ motion.

3 In civil enforcement actions brought by the SEC, federal courts may grant “any
4 equitable relief that may be appropriate or necessary for the benefit of investors,” 15
5 U.S.C. § 78u(d)(5), including disgorgement of the gains obtained from securities law
6 violations, *see, e.g., Platforms Wireless*, 617 F.3d at 1096. “Courts may also exercise
7 their broad equitable powers to order disgorgement from non-violating third parties who
8 have received proceeds of others’ violations to which the third parties have no legitimate
9 claim.” *SEC v. World Capital Mkt., Inc.*, 864 F.3d 996, 1003 (9th Cir. 2017). Such non-
10 violating third parties are referred to as “relief defendants” or “nominal defendants.” *Id.*
11 at 1003-04. “Although the paradigmatic example of a nominal defendant is ‘a bank or
12 trustee [that] has only a custodial claim to the property,’ . . . the term is broad enough to
13 encompass persons who are in possession of funds to which they have no rightful claim,
14 such as money that has been fraudulently transferred by the defendant in the underlying
15 securities enforcement action.” *SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007)
16 (quoting *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998)); *see also SEC v. Hickey*, 322
17 F.3d 1123, 1130-32 (9th Cir. 2003) (upholding the district court’s exercise of jurisdiction
18 over a corporation nominally owned by the defendant’s mother and into which the
19 defendant channeled proceeds of his securities violations).

20 To obtain relief against a relief defendant, the SEC must demonstrate: (1) the
21 relief defendant “received ill-gotten funds”; and (2) the relief defendant “do[es] not have
22 a legitimate claim to those funds.” *World Capital*, 864 F.3d at 1004; *see also Colello*,

1 139 F.3d at 677. “Performing services in exchange for compensation is a sufficient
2 claim of ownership to preclude relief defendant treatment.” *U.S. Commodity Futures*
3 *Trading Comm’n v. WeCorp, Inc.*, 848 F. Supp. 2d 1195, 1202 (D. Haw. 2012) (citing
4 *Ross*, 504 F.3d at 1142). “A claim of ownership is not legitimate where the relief
5 defendant holds the funds in trust for the primary violator, the ownership claim is a sham,
6 the relief defendant acted as a mere conduit of proceeds from the underlying statutory
7 violation, or some similar specious claim to ownership.” *WeCorp, Inc.*, 848 F. Supp. 2d
8 at 1202 (citing *Ross*, 504 F.3d at 1141-42).

9 The SEC adduces no evidence that PIA, a Washington State company controlled
10 by Mr. Chen (*see* Compl. ¶ 19), received ill-gotten funds to which it has no legitimate
11 claim. In the complaint, the SEC alleges that PIA received proceeds from investor funds
12 that Mr. Chen funneled into ASPI’s TD Ameritrade account. (*Id.* ¶ 50.) Nonetheless,
13 Ms. Misuraca’s report does not state that PIA ever received EDC III investors’ funds or
14 proceeds arising from those funds (*see generally* Misuraca Rep.), and the SEC directs the
15 court to no evidence to that effect (*see generally* Pl. Resp.). Because the SEC has failed
16 to allege facts supporting the court’s exercise of jurisdiction over PIA, the court finds
17 PIA is entitled to summary judgment. *See Lane v. Dep’t of Interior*, 523 F.3d 1128, 1140
18 (9th Cir. 2008) (stating that allegations in the complaint are insufficient to defeat
19 summary judgment).

20 Nonetheless, the SEC provides sufficient evidence to raise genuine issues of fact
21 as to whether the remaining Relief Defendants received ill-gotten funds to which they
22 were not entitled. According to Ms. Misuraca’s report, between 2011 and 2016,

1 Defendants channeled EDC III investor funds for non-EDC III purposes to EDC I
2 (Misuraca Rep. at 18), EDC II (*id.* at 30), Moses Lake 96000 (*id.* at 28), EVF (*id.* at 18),
3 and Sun Basin Orchards (*id.* at 27, 30). Defendants also used EDC III investor funds to
4 compensate Heidi Chen, an ASPI employee, and John Chen, Tom Chen, and Bobby
5 Chen, ASPI board members. (*Id.* at 32-34.)

6 Relief Defendants do not dispute that they received funds from EDC III. (*See*
7 *generally* Def. MSJ.) Nor do they provide evidence that any Relief Defendant performed
8 services for EDC III for which they would be entitled to compensation. (*See generally*
9 *id.*); *see also WeCorp, Inc.*, 848 F. Supp. 2d at 1202. Rather, Relief Defendants argue
10 that any EDC III investor funds they obtained were transferred “in the ordinary course of
11 business,” such that they enjoy “presumptive title to the funds at issue.” (*Id.* at 23-24.)
12 That position necessarily assumes ASPI’s ordinary course of business did not involve
13 violations of securities laws. As discussed above, however, Defendants acquired EDC III
14 investor funds in violation of Rule 10b-5(b) and Section 17(a)(2) of the Securities Act.
15 *See supra* Section III.C. Accordingly, Relief Defendants may not have “a legitimate
16 claim” to EDC III investor funds. *See World Capital*, 864 F.3d at 1004 (explaining that
17 “[r]elief defendants cannot defeat jurisdiction simply by asserting an ownership interest
18 in the disputed funds”).

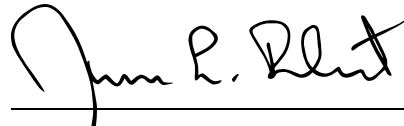
19 The SEC states it will seek further proceedings to determine remedies. (Pl. MSJ at
20 1.) In future proceedings, the court may examine whether any Relief Defendant has a
21 legitimate claim to funds found to be the proceeds of securities fraud. *Cf. World Capital*,
22 864 F.3d at 1005-06 (finding that the district court appropriately held an evidentiary

1 hearing to adjudicate “the legal and factual validity” of the relief defendants’ claims to
2 the disputed funds “to determine whether it had jurisdiction over them as relief
3 defendants”). For purposes of Relief Defendants’ present motion, however, the court
4 concludes that there remain genuine disputes of material fact as to whether Relief
5 Defendants—with the exception of PIA—are properly before the court. The court
6 therefore GRANTS in part and DENIES in part Relief Defendants’ motion for summary
7 judgment.

8 IV. CONCLUSION

9 For the foregoing reasons, the court GRANTS in part and DENIES in part the
10 SEC’s motion for summary judgment (Dkt. # 36) and GRANTS in part and DENIES in
11 part Defendants’ and Relief Defendants’ motion for summary judgment (Dkt. # 25).

12 Dated this 15th day of February, 2019.

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15 The Honorable James L. Robart
16 U.S. District Court Judge
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